No. 9467

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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W. W. PERCIVAL, Guardian of the persons and estates of John Percival Luce and Dorothy Hume Luce, Minors,

Appellant,

vs.

HAROLD LUCE,

Appellee.

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

Appellee is not satisfied with appellant's statement of the case. Appellant minimizes the material facts necessary to an intelligent consideration of the questions of law involved in this matter. Appellee believes he may present most clearly his view of the material facts of this case by setting forth a complete statement of the case.

Throughout this brief numbers in parentheses indicate page references to the "Transcript of Record" on

file herein. Also, unless otherwise indicated, all italics are supplied by the writer.

STATEMENT OF THE CASE.

Appellee and his former wife were married on May 16, 1921, (4). Two children, John Percival Luce and Dorothy Luce, were born, the issue of the marriage (4). On February 25, 1925, appellee and his former wife, in contemplation of a divorce, entered into an agreement by the terms of which the wife was to have the custody of the two children and the appellee was to pay the sum of Twenty-five ($25.00) Dollars per month for the support of each of the children (4, 5). On February 25, 1925, the wife divorced appellee in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe (8). The agreement was merged into and became a part of the judgment and decree of divorce (8).

On October 14, 1926, the Second Judicial District Court of the State of Utah, in and for the County of Weber, duly made and entered a judgment and decree of adoption in that certain cause entitled "In the Matter of the Adoption of John Percival Luce and Joan Luce, sometimes called Dorothy Luce, Minors," the same being case No. 4272 in the records and files of said Court, wherein it was ordered that John Percival Luce and Joan Luce, sometimes called Dorothy Luce, be adopted by Irving Lehman and his wife, Dorothy Lehman, formerly Dorothy Luce. By said judgment and decree of adoption the names of said minor children were changed to John Percival Lehman and Joan Lehman, and said minor children were decreed the right of support, protection

and inheritance from their adopting parents. Since October 14, 1926, to the present time, said minor children have been treated and regarded as the lawful children of Irving Lehman and Dorothy Percival Lehman, and have sustained toward said adopting parents the status of children and parents. The judgment and decree of adoption is still in full force and effect (9, 10).

From February 25, 1925, to November 1, 1926, appellee made payments of Fifty ($50.00) Dollars per month to his former wife for the use and benefit of said minor children. On or about November 13, 1926, appellee's certified check in the sum of Fifty ($50.00) Dollars, remitted to Dorothy Lehman, was returned by her to appellee. At the time said check was returned to appellee by Dorothy Lehman, the said Dorothy Lehman advised the appellee that the minor children had been adopted and that further payments for the support of the children would not be accepted by her or by anyone else on behalf of said minor children. Relying on the refusal to accept further payments for the support of said minor children, appellee since said date has made no payments for their support. Since November, 1926, no demand has been made upon appellee for contributions for the support of said minor children by the appellant or by anyone else on behalf of said minor children (8, 9).

On June 27, 1939, approximately thirteen years after the adoption of the children by their mother and her second husband and approximately fourteen years after the divorce of appellee and his former wife, this action was filed by the appellant as the guardian of the persons and estates of the two children.

After appellee had filed his answer to the complaint both parties moved for judgment on the pleadings. The lower Court granted appellee's motion.

ARGUMENT.

Before discussing the principles of law applicable to this case, appellee will briefly answer the appellant's argument.

Regarding the nature and effect of a motion for judgment on the pleadings, appellant states on pages 4, 5 and 6 of his brief that the moving party admits the untruth of his own allegations; that such motions are not favored by the Courts; that such a motion does not admit conclusions of the pleader; and that if a material issue of fact is tendered a judgment on the pleadings is improper. None of the rules or authorities cited are applicable in the case at bar. The pleadings do not raise a material issue of fact. *Both parties moved for judgment on the pleadings and the Court had both motions under consideration at the same time.*

Appellant contends that in considering a defendant's motion, the Court is confined to the allegations of the plaintiff's complaint and that the defendant admits the untruth of the allegations in his answer. Appellant then argues that in considering a plaintiff's motion, the Court must assume the truth of all the material allegations in both pleadings. This might be true if the Court had under consideration solely a plaintiff's motion or a defendant's motion, but where both plaintiff and defendant move for judgment on the pleadings the allegations of both the complaint and answer must be accepted as true.

Carroll v. *Equitable Life Assurance Co.* (1934), 9 Fed. Supp. 223.

The question before the lower Court was not directed exclusively at whether appellant's complaint stated a cause of action, but whether it stated a claim upon which relief could be granted in view of the defenses in appellee's answer which were admitted by the appellant to be true.

That part of appellant's brief which is devoted to explaining the theory of his complaint as a third party beneficiary action and citing cases in support thereof, is, therefore, immaterial and merits no serious consideration.

Appellant's argument in support of his contention that the Court erred in granting appellee's motion for judgment on the pleadings is based on an erroneous conception of the law where both parties move for judgment on the pleadings.

Appellee freely admits that he was obligated, as a natural father, to support his children at the time the agreement sued upon was made and that the agreement merely served to definitely state the amounts to be paid by him to their mother for their support. Since the agreement was made, however, it has been merged into and become a part of a decree of divorce and no longer exists, and no suit can be maintained thereon.

In support of his contention that adoption does not deprive a child of its right of support, appellant states on page 20 of his brief,

> "It has been repeatedly held under adoption statutes, similar to those in force in Utah and also in Nevada, that adoption does not deprive

> a child of a similar right, that of inheritance from its natural parents. In the case of Sorenson v. Churchill, 51 S. D. 113, 212 N. W. 488, the Court said:
>
> 'Under the law of adoption, the natural parent and the adopting parent each must consent to the new relationship before the child can be legally adopted. By consent each is bound. The adopted child, the person principally affected by the transaction, has no choice and gives no consent. His natural parent, by his consent to his adoption, loses his right to inherit from his natural son. But no one consents for the innocent and helpless subject of the transfer that he shall lose the right to inherit from his natural parent * * *.'
>
> The same reasoning is applicable to the right of support."

The law is settled to the contrary. The statutes of Utah and Nevada provide that from the time of the adoption the natural parent is relieved of all parental duties toward, and all responsibility for, the child so adopted.

Inheritance is governed by the succession statutes of the different states. To find out the effect of an adoption on the right of support from the natural parent, one must refer to the adoption statutes, not the succession statutes.

Appellee has examined the annotation in 80 A. L. R. 1403 cited by appellant in support of his argument. The annotation discloses a California case at page 1405. Appellee quotes from the annotation at page 1405:

> "And in Re Darling (1916) 173 Cal. 221, 159 Pac. 606, the Court stated, although the

> point was not presented for decision, that under the adoption statute (which provided in effect that the adopted child was to be regarded and treated in all respects as the child of the person adopting, and that, after the adoption, the child and the person adopting sustained towards each other the legal relation of parent and child, and had all the rights, and were subject to all the duties, of that relation, and that the parents of an adopted child were, from the time of the adoption, relieved of all parental duties towards, and all responsibilities for, the child so adopted, and had no right over it), the adopted child could not inherit from his parents by blood, because, so far as they were concerned, he was no longer their child."

Appellant then contends that the adoption is void for lack of appellee's consent. It is alleged in appellee's answer that "On October 14, 1926, the Second Judicial District Court of the State of Utah, in and for the County of Weber, duly made and entered a judgment and decree of adoption * * *." This allegation, under the authority of *Carroll* v. *Equitable Life Assurance Co.* (supra,) is admitted by the appellant. Appellant, therefore, is not in a position to raise this question, but if he was, the case of *In re Jackson*, 55 Nev. 174, 28 P. (2d) 125, cited by him is not in point nor can a guardian complain of lack of consent.

The Jackson case is not authority for the proposition that a guardian representing minor children can void an adoption for lack of consent. In that case there was a timely objection made by the father who had remaining rights over the children and the Court construed

the statute strictly in favor of the father and set aside the decree of adoption. The proceeding in the Jackson case was one instituted to vacate a decree of adoption by a timely motion made to the same Court that granted the adoption. In the present case the appellee has not objected to the adoption in Utah. In fact, the judgment and decree of adoption is still in full force and effect (10). The law is well established that the parent alone can complain of want of notice or consent.

Slattery v. *Trust Company,* 254 Mich. 671; 236 N. W. 902.

In re Zehner's Estate, 130 Neb. 375; 264 N. W. 891.

Appellee will assume in this brief, as he did in his briefs submitted to the lower Court, that the complaint states a cause of action. Appellee will then demonstrate conclusively that the appellant is not entitled to any relief because the defenses in the appellee's answer are an absolute bar to the granting of any relief.

I.

THE AGREEMENT UPON WHICH APPELLANT'S COMPLAINT IS BASED DOES NOT EXIST AS IT WAS MADE IN CONTEMPLATION OF A DIVORCE AND WAS MERGED INTO AND BECAME A PART OF A JUDGMENT AND DECREE OF DIVORCE DULY MADE AND ENTERED ON THE 25TH DAY OF FEBRUARY, 1925.

It is elementary that where an agreement is made part of a judgment or decree it becomes a part of such judgment or decree and merges with it. The rule is well stated in Corpus Juris as follows:

"A claim or demand being put in suit and

> passing to final judgment, is merged or swallowed up in the judgment, loses its vitality, and cannot thereafter be used either as a cause of action or as a set-off * * *."
>
> 34 C. J. 752, Sec. 1163.

The agreement is merged in the decree of divorce and it is extinguished and no longer exists.

> *Finley* v. *Finley,* (1935) 174 Okla. 457, 50 P. (2d) 643.
>
> *Belding* v. *Huttenlocher,* (1916), 177 Iowa 440, 159 N. W. 191.
>
> *McRoberts* v. *McRoberts,* (1935) 177 Okla. 156, 57 P. (2d) 1175.

The obligation of a parent to support his children is of course founded on a duty imposed by law by reason of the relation of parent and child and is not founded upon contract.

In event a contract is made for the support of children pending a divorce or in contemplation of divorce that contract is not binding on the Courts.

> *Atkins* vs. *Atkins,* 50 Nev. 333, 259 Pac. 288.

Let us suppose for example that the Court in the instant case awarded the mother of these children the sum of $30.00 per month for their support instead of the sum of $50.00 per month which the parties agreed upon. Could the mother receive and accept $30.00 per month under the divorce decree and then maintain an action on the contract for $50.00 per month? It is obvious that she could not for in such a case it is clear that the contract would be extinguished by the divorce decree.

Suppose in the instant case that the Court in granting the divorce ordered the appellee to pay the sum of $100.00 per month instead of $50.00 per month, or, that after the divorce conditions changed and an order modifying the decree was sought to increase the amount for the children. The appellee obviously could not successfully contend by way of defense that he had agreed to pay only $50.00 per month and that the agreement limited his liability. Appellee clearly could not contend that his obligation was founded on contract.

When, therefore, as in the instant case, the agreement is merged into and has become a part of a decree of divorce, the agreement is extinguished and no longer exists. The amounts to be paid for the children are fixed by an order of Court and no action can be maintained on the agreement. Appellant's argument assumes that the contract sued upon survived the decree of divorce. The pleadings show that the contract was made in contemplation of the divorce and was merged into and became a part of the decree of divorce and no longer exists.

II.

THE AGREEMENT UPON WHICH APPELLANT'S COMPLAINT IS BASED WAS RESCINDED BY THE PARTIES IN NOVEMBER, 1926.

In volume 6, Williston on Contracts, Sec. 1826, the learned author says:

> "Mutual assent to abandon a contract like mutual assent to form one may be inferred from the attendant circumstances and conduct of the

> parties * * *. Sometimes circumstances of a negative character such as failure to take any step looking toward enforcement or performance of the contract also justify the inference of mutual assent to rescind."

In *Peoples Bank and T. Co.* v. *Weidinger* (1906), 72 N. J. L. 443, 64 Atl. 179, it was held that an agreement by a parent to pay over certain money for the support of his children remained revocable and could be rescinded by the parties at any time before it was acted on by the beneficiaries.

III.

THE COMPLAINT SHOWS THAT THE APPELLANT, W. W. PERCIVAL IS IN THE SAME POSITION AS DOROTHY LEHMAN, FORMERLY DOROTHY LUCE, THE MOTHER OF SAID MINOR CHILDREN, AND THAT SAID DOROTHY LEHMAN, AND ALSO THE APPELLANT STANDING IN HER SHOES, FOR AN UNCONSCIONABLE LONG PERIOD OF TIME, HAVE ABANDONED AND SLEPT ON ANY RIGHT OR RIGHTS THEY, OR EITHER OF THEM, MAY HAVE HAD FOR AND ON BEHALF OF SAID MINOR CHILDREN, BY VIRTUE OF SAID AGREEMENT, AND, THEREFORE, HAVE BEEN GUILTY OF LACHES.

The facts show that for nearly thirteen years no demand has ever been made upon appellee to comply with the terms of the alleged agreement or to support the minor children. Appellee, since November 1926, relying on the refusal of the mother of said children to accept payments for the support of the children and

relying upon the fact that the children had been adopted, has made no payments for the support of the minor children.

21 C. J. 210, Sec. 211.

IV.

THE MINOR CHILDREN, ON WHOSE BEHALF APPELLANT HAS SUED, WERE DULY ADOPTED BY A JUDGMENT AND DECREE OF ADOPTION ON OCTOBER 14, 1926, AND FROM THE DATE OF THE ADOPTION APPELLEE, AS THE NATURAL PARENT, WAS RELIEVED OF ALL RESPONSIBILITIES FOR THE CHILDREN SO ADOPTED.

The law of Utah at the time of the adoption in the instant case is found in Compiled Laws of Utah, (1917), Vol. I, Sec. 18.

> "The parents of an adopted child are, from the time of the adoption, relieved of all parental duties toward, and all responsibility for, the child so adopted, and shall have no rights over it."

To the same effect is the Nevada Law. Sec. 9480 Nevada Compiled Laws (1929) provides as follows:

> "A child, when adopted, may take the family name of the person or persons adopting, and after adoption the persons adopting, and the child, shall sustain towards each other the legal relation of parent and child and have all the rights, including the rights of support, maintenance, protection, and inheritance, and be subject to all of the duties of that relation; *and the natural parents of an adopted child are, from the time of the*

adoption, relieved of all parental duties toward, and all responsibilities for, the child so adopted, and have no rights over it."

The Utah Statute was taken from Sec. 229 of the Civil Code of California. That section of the California Code is as follows:

> "The parents of an adopted child are, from the time of the adoption, relieved of all parental duties toward, and all responsibility for, the child so adopted, and have no rights over it."

In the case of *Mitchell* v. *Brown*, 18 Cal. App. 117; 122 Pac. 426, a child was adopted. Thereafter, the adopting parent placed the child in the care of its natural parent, and agreed with the natural parent to pay for the support of the child. After the death of the adopting parent the child's natural parent sued on the contract made by the adopting parent to recover money spent for the support of the child. The trial court non-suited the plaintiff. In reversing the case the California Supreme Court said, at page 427:

> "The legal effect of the proceedings by which Alphia became the adopted child of the deceased was to disrobe the natural parents of all parental or any authority over the minor. The child by virtue of those proceedings and the order of the Court therein, became, in all respects legally the child of the deceased (Sec. 227, Civil Code) and from the time of the adoption thenceforward the deceased and the child sustained toward each other the legal relation of parent and child and had all the rights, and were subject to all the duties of that relation (Civil Code 228). Furthermore, the natural parents of the child, from the time of

> the adoption, were, relieved of all parental duties toward, and all responsibility for, the child * * *. The parental obligations of the natural parents to such child ceased to exist and the former, after such adoption, are no more legally liable for the maintenance, support and education of the child than a perfect stranger would be."

As already pointed out, the statutes of Nevada, Utah and California are the same.

In Vol. I, Cal. Juris. 442, it is said:

> "The effect of an adoption is to establish between the adopting parents and the adopted child, the legal relation of parent and child, with all the incidents and consequences of that relation. In other words, by an adoption the adopting parent is substituted for the natural parent. Hence, from the time of the adoption, the adopting parent is, so far as concerns all legal rights and duties flowing from the relation of parent and child, the parent of the adopted child. From the same moment the parent by blood ceases to be in a legal sense the parent."

The same text at page 444 says:

> "Since after the legal adoption of a minor child by another person the parental obligations of its natural parents cease to exist, it follows that they are no more legally liable for the maintenance, support and education of such child than would be a perfect stranger, and the adopting parent has the same obligation toward the adopted child as he would have toward a child born in lawful wedlock."

The New York Domestic Relations Law, Sec. 114 Provides:

> "Effect of adoption—thereafter the parents of the person adopted are relieved from all parental duties toward, and of all responsibility for, and have no rights over such child, or to his property by descent or succession."

This statute was construed in the case of *Gross* v. *Gross*, 179 N. Y. S. 900 (1920); 110 Misc. 278. In that case the plaintiff wife obtained a judgment of divorce from the defendant husband. The defendant by the decree of divorce was required to support the children of the marriage. Later the wife remarried and the children were adopted by the wife and her second husband. The defendant in the divorce action moved to strike from the judgment the direction requiring him to support the children, his contention being that the adoption relieved him from all parental duties and responsibilities. It was held that the defendant was relieved, by the adoption, from all his parental duties and responsibilities and that he could no longer be required to support the children.

In the case of *Betz* v. *Horr*, 276 N. Y. 83, 11 N. E. (2nd) 548, a statutory proceeding was instituted to require the natural parent to contribute toward the support of the petitioner who had been adopted by her maternal grandparent. The defendant claimed that he was relieved from any liability by virtue of the adoption decree. It appeared that the adopted child was likely to become a public charge. The Court held that after the adoption the parents of the person adopted were relieved from all parental duties toward, and all re-

sponsibility for, the adopted child. This case is annotated in 114 A. L. R. at page 494 where there is a collection of cases which set forth the law as above outlined.

CONCLUSION.

Appellee is not seeking to evade his obligation to support his children. There is and has been no obligation to support these children since October 14, 1926, the date of the adoption, because from that date thenceforward they were no longer his children. The duty of a parent to support his children is based on the relationship or status of parent and child. These children, on whose behalf appellant seeks to recover on the agreement, are no longer the children of appellee. They are the children of Irving Lehman and his wife Dorothy Lehman, formerly Dorothy Luce. The statutes of Nevada and Utah provide that from the time of the adoption the natural parent is relieved of all responsibilities for the child so adopted.

In view of the adoption, which is admitted by the appellant, the complaint fails to state a claim upon which relief can be granted, and the lower Court's ruling granting the defendant's motion for judgment on pleadings was correct and should be affirmed.

Respectfully submitted,

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